

Sidestepping Sovereignty:

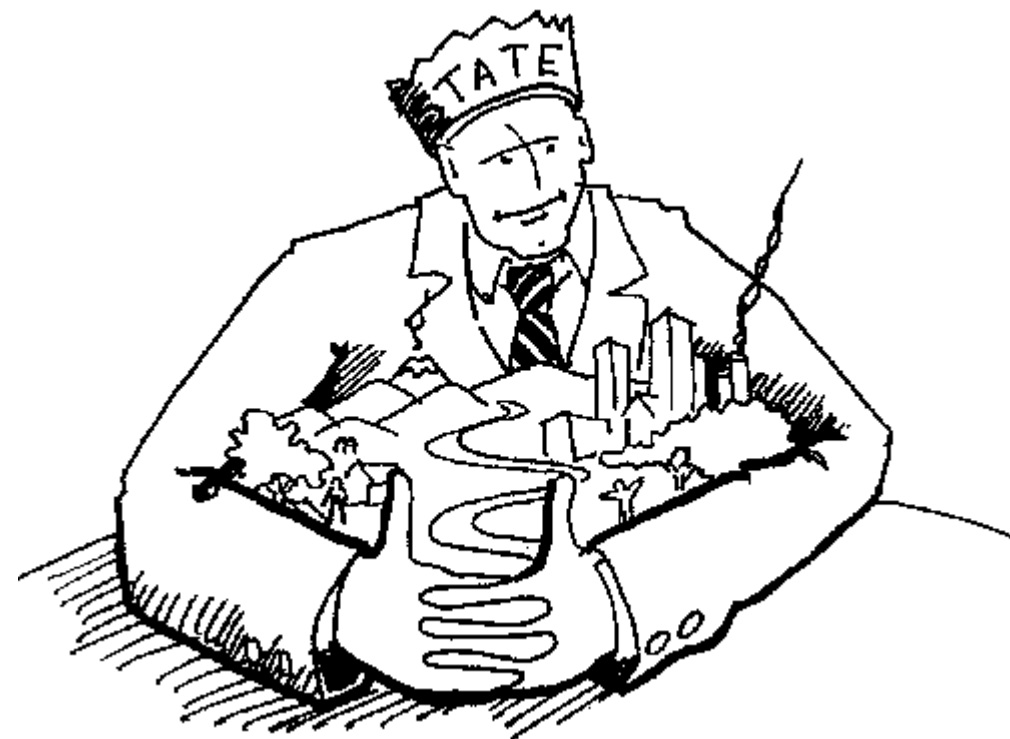
Corporations as the New Global Rule Makers

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Government to appeal High Court ruling on Article 50



SOVEREIGNTY: FUNDAMENTAL PRINCIPLE

Right of State to exercise authority within a specific territory = Westphalian tradition (Halliday and Shaffer)

Repercussions:

- Respect sovereign equality and independence of other States
- Rulemaking has territorial limits

TERRITORIAL JURISDICTIONAL LIMITS

State-issued rules can only govern own territory

- “Jurisdiction ... cannot be exercised by a State outside its territory” (§45)

States are only bound by international law if they agree

- Rules “emanate from their own free will” (§44)

1927 Lotus case (PCIJ)

SOVEREIGNTY ON GLOBAL STAGE UNDER STRAIN

1. International regulatory convergence
2. Increased corporate power, channeled through alternative regulatory instruments (ARIs)

1. INTERNATIONAL REGULATORY **CONVERGENCE**

INTERNATIONAL REGULATORY CONVERGENCE

Globalization causes legal norms in different jurisdictions to converge to a common point

Race-to-the-bottom (RTTB) (Delaware effect)

Or

Race-to-the-top (RTTT) (California effect)

And / or (?)

Unilateral regulatory globalization (Brussels effect)

CONVERGENCE THROUGH RTTB

Goal: State seeks to attract MNC presence (tax revenue; job opportunities)

(Mostly) indirect process

1. State A *de facto* adopts same / laxer standard as State X to woo MNC
2. MNC agrees to State A's offer = conduit
3. State A *de jure* adopts State X standard (or lower)

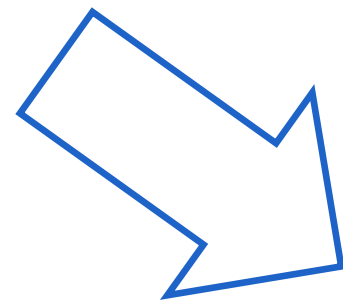
CONVERGENCE THROUGH RTTT

Goal: enterprise seeks access to strictly regulated market

1. MNC already active in State A; seeks access to strict State X market and complies with its rules
2. Production process is streamlined (scale effects; uniform brand) -> MNC *de facto* applies State X rules in State A
(*Brussels effect!*)
3. MNC lobbies State A to level playing field with competition

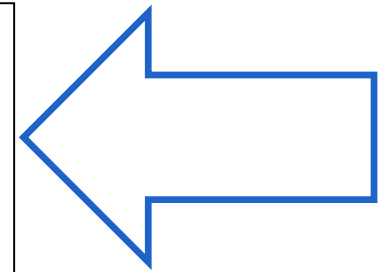
State X's rules are *de facto* applied in State A

- RTTB: State A offers the same low, or even lower, standards as State X to attract corporate investments
- RTTT: A corporation in State A behaves according to the rules of State X because it maintains a uniform production process



Corporations act as conduits

- RTTB: Corporation agrees to State A's offer: the lower standard, based on that of State X, is formally adopted
- RTTT: Corporation lobbies State to adopt the rules of State X



State X's rules are *de jure* applied in State A

FIRST CONCLUSION

Corporations act as intermediaries,
both in RTTB and RTTT

(Link with Abbott's 'Orchestration' ?)

Circumvents sovereignty

2. CORPORATE MIGHT AND ALTERNATIVE REGULATORY INSTRUMENTS (ARIS)

“... the political boundaries of nation states are too narrow and constrictive to provide adequate scope for modern, large-scale economic activities”

- GEORGE W. BALL, GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS, **1975!**

TECH REGULATION: POWER VACUUM

Sharp differences in ideology and geopolitical interests

- China + Russia = isolationism
- United States = laissez-faire
- European Union = extraterritorial activism

No UN consensus + WTO powerless

Tech corporations take lead ('norm entrepreneurship')

- 'Deterritorialization' (Barkan)
- Resistance to state regulation (Eichensehr; Kilovaty; Cohen)
- 'Circular relay of control' (Harbinja and Karagiannopoulos)

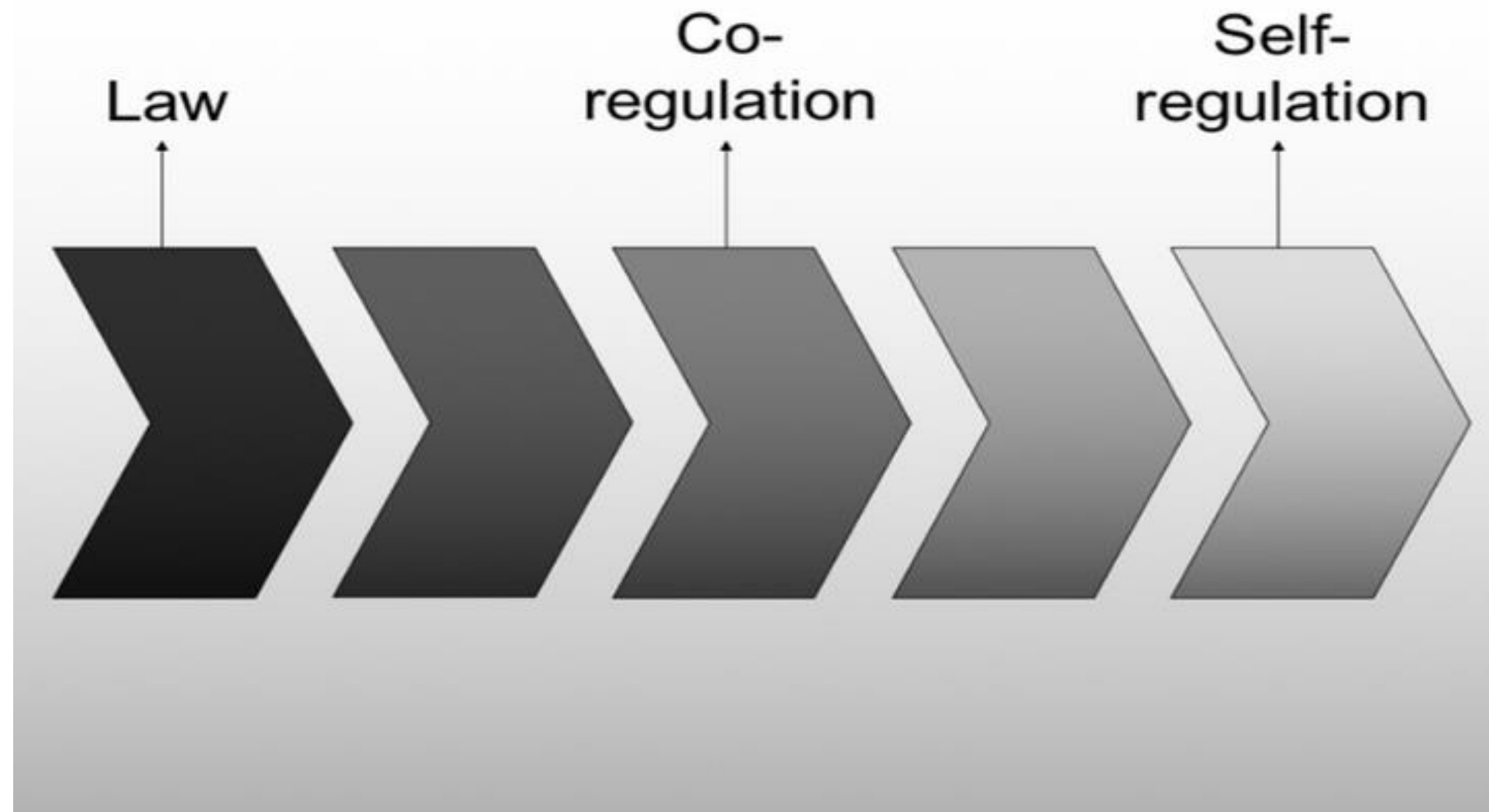
THE EU AND ARIS

EU taps into corporate power through alternative regulatory instruments (ARIs)

Nuance the regulatory role of government institutions...
... by involving private actors...
... in the process of drafting and implementing rules

Weaken **hard law**'s dimensions of obligation, precision, and delegation (Abbott & Snidal)

THE REGULATORY CONTINUUM



Eva Lievens, Protecting Children in the Digital Era:
The Use of Alternative Regulatory Instruments (2010) 229

MAIN ADVANTAGES

Private expertise

Decentralised regulatory authority: fast adoption and revision

- Ex ante: nimble anticipatory action
- Ex post: effective enforcement

Multi-stakeholder process:

- Higher quality
- Public accountability
- Higher compliance rates

GRAVITATION TOWARDS CODES OF CONDUCT TO REGULATE MNCS

Regulate the activities of non-state actors...

... enhance their accountability in the international marketplace...

... by defining voluntary standards and principles

= do not threaten state sovereignty and equality

= construct a transnational, normative regime

(Helen Keller, Corporate Codes of Conduct and their Implementation: The Question of Legitimacy, in LEGITIMACY IN INTERNATIONAL LAW, 3 (2008))

NEW TREND IN EU: 'HARD' APPROACH TO CODES

EU determines design and implementation

'Hardening' of the three dimensions

- Obligation
- Precision
- Delegation

OBLIGATION: FROM VOLUNTARY TO *DE FACTO* OBLIGATORY

Past: codes as voluntary ruleset

Now: codes as liability reduction mechanisms

- Article 83, 2 (j) GDPR
- Directive on Better Enforcement and Modernization of EU Consumer Protection

Direct link to punitive hard law: de facto obligatory

PRECISION: FROM OPEN NORMS TO PRECISE STIPULATIONS

Past: codes as 'open' norms

Now: broad policy, codes to specify

- Tackling Online Disinformation: A European Approach
(COM/2018/236 FINAL) 7–8
- Recital 98; article 40, 2 GDPR

No longer vague; diminish corporate *discretion*

DELEGATION: FROM NON-JUDICIAL MECHANISMS TO BINDING PROCEDURES

Past: non-judicial monitoring mechanisms

Now: pre-approval and monitoring bodies

– Article 40, 5-9; article 41, 2 GDPR

**Diminishes decentralised character; becomes more
*cumbersome to adopt and revise***

SECOND CONCLUSION: FROM OPT-IN TO OBLIGATION?

Hardening of the three dimensions of law

- Obligation: from voluntary to *de facto* obligatory
- Precision: from open norms to precise stipulations
- Delegation: from non-judicial mechanisms to binding procedures

**No longer voluntary; no longer discretionary; increasingly centralised
= friction with state sovereignty**

FINAL CONCLUSION

Is the international law system obsolete?

- International regulatory convergence
- Increasing power of tech corporations
- EU's use of ARIs

Any role for sovereignty?

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